Zeppelin Electric Company, Inc. *and* Local Union No 25, International Brotherhood of Electrical Workers, AFL–CIO. Case 29–CA–20660

May 20, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On October 6, 1997, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by threatening employee Stephen Shanahan, and did not violate Section 8(a)(3) of the Act by discharging Shanahan for engaging in union or protected concerted activity. We disagree.

The Respondent is a nonunion electrical contractor. Its president and owner is William Zeppelin. In early January 1997,² the Respondent advertised for an electrician who would be willing to travel. Stephen Shanahan, a member of the Union who had assisted it in organizing electrical contractors on a voluntary basis, answered the ad.³ On Monday, January 6, Shanahan was interviewed by the Respondent's supervisor, Charles Zeppelin (Charles), who was also William Zeppelin's brother. During the interview, the two discussed a job in Albany that the Respondent had scheduled for later that week. Shanahan informed Charles that he could not travel that week because of child custody problems. Charles replied that Shanahan's inability to travel was a problem that would have to be discussed with William Zeppelin. Thereafter, William Zeppelin told Shanahan that if he could not travel then he could not work for the Respondent in Albany, but if the Respondent needed an extra employee on a local job in the future they would call Shanahan.4

Shanahan was hired on January 6 and worked for the next 2 days. Upon being hired, Shanahan informed the Union of his employment with the Respondent. Shanahan was laid off later that week when the Respondent began working in Albany.

Thereafter, the Respondent recalled Shanahan to work on a job beginning January 17. On January 17, Shanahan faxed William Zeppelin a letter from the Union advising that, during his off-hours, Shanahan would be trying to organize the Respondent's employees on behalf of the Union. The letter also cautioned the Respondent not to discriminate against Shanahan. William Zeppelin received the letter at his office and immediately telephoned his brother at the jobsite. He read the letter to Charles and told him not to do anything about it, but advised that Shanahan should not engage in union activity during working time.

There is conflicting testimony concerning what occurred after Shanahan arrived at the jobsite.

Shanahan testified that upon his arrival at the jobsite, he handed the Union's letter to Charles. After reading the letter, Charles asked him if it was some kind of joke. Shanahan responded that it was not a joke and returned to work. Approximately 20 minutes later, Charles approached Shanahan and yelled, "I love my brother and if anything happened to him, I will fucking kill you." He then asked Shanahan what work he had done all morning. Shanahan pointed to some bent pipe and told Charles that the Respondent's workers did not know what they were doing and that if the Respondent hired union members, it would get competent workmen. Charles then told Shanahan to take his "union shit and get out of here." Shanahan then left the jobsite and went to the police station to file a complaint.

Charles' version is different. He testified that when Shanahan handed him the letter, he noticed that Shanahan was wearing a union hat rather than the required hairnet or hardhat. Charles asked Shanahan if he was kidding about the letter, and Shanahan said no. Later that morning, Charles observed Shanahan talking to an employee about the Union, whereupon he sent Shanahan to get a hacksaw. When Shanahan returned without one, he approached Charles and asked him to join the Union. Charles responded negatively. Shanahan said, "[W]e have ways of making you join."

Thereafter, according to Charles, Charles noticed that Shanahan was not performing his assigned work and told him that "if anything happens to my brother I'm holding you personally responsible." Shanahan gave him the finger, and Charles said, "[H]ow would you like it if your family was messed with." Shanahan asked if Charles was threatening him, and said he was going to the police. Charles told Shanahan to leave, whereupon Shanahan

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² All dates hereafter refer to 1997.

³ The judge stated that Shanahan had made his living as a "salt," and that Shanahan had been fired from several nonunion jobs. The statements are pure speculation, and unsupported by the record evidence.

⁴ William Zeppelin testified that he told Shanahan he "specifically need[ed] . . . people to come to Albany . . . [but] if we're down here [locally] and I need an extra hand or two . . . I'll definitely call you if that's what you would like." The judge mischaracterized this testimony

by stating that William Zeppelin told Shanahan "that if he couldn't travel, then he could not work for the company."

ZEPPELIN ELECTRIC CO. 453

asked if he was being fired. Charles replied that he was not the boss, that he could not fire him, and that he would have to talk to the boss. Shanahan left the job and went to the police station.

It is uncontroverted that Shanahan never returned to work for the Respondent.

Without making specific credibility findings regarding the conflicts in testimony, the judge found that Charles made the statement threatening to kill Shanahan. He further found, however, that the threat was not in response to Shanahan's union or protected concerted activity, but rather was made because of Charles' belief that Shanahan was trying to sabotage the Respondent's job. The judge also found that Shanahan never intended to become a permanent employee.⁵ According to the judge, Shanahan was intent upon provoking the Respondent into discharging him, and accomplished this result by not doing the work assigned to him and by not wearing the required hairnet or hardhat. Accordingly, the judge concluded that the Respondent did not unlawfully threaten or discharge Shanahan for engaging in union or protected concerted activity.

We disagree with the judge's conclusion. At the outset, we note that, apart from crediting Shanahan's testimony that Charles threatened to kill him, the judge failed to make specific credibility findings as to the conflicting testimony concerning the remarks that were made prior to the discharge.⁶ If Shanahan's testimony is credited, a finding of unlawful conduct is clearly warranted. However, even if Charles' testimony is credited with respect to matters other than his threat to kill, we find that the evidence is sufficient to establish that the Respondent acted unlawfully. According to Charles, he asked Shanahan if he was kidding about the letter advising the Respondent about Shanahan's union activity, and Shanahan responded no. Discussion about the Union continued when Shanahan asked Charles to join the Union, and upon receiving a negative response, said "[W]e have ways of making you join." Charles subsequently approached Shanahan when he was not working, an argument ensued over the earlier exchange concerning the Union, and Shanahan was ordered to leave.

This testimony, together with the credited testimony that Charles contemporaneously threatened to kill Shanahan if anything happened to his brother, establishes a prima facie showing under *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied

denied 455 U.S. 989 (1982),⁸ that Shanahan's protected activity was a motivating factor in the decision to terminate him. The prima facie showing is made by the testimony of both Charles and Shanahan, that, upon learning of Shanahan's salting activities, the Respondent promptly threatened Shanahan and discharged him.

Although Charles observed that Shanahan was not wearing the required hairnet or hardhat and was periodically not working, the record does not show that these issues prompted Charles to ask Shanahan to leave. Indeed, there is no contention that Shanahan was warned about the hair attire or about not working. Nor is there a contention that the Respondent was not happy with Shanahan prior to learning of his union activity. To the contrary, the Respondent had called Shanahan back to work after he had worked 2 days for the Respondent; and even as to Shanahan's conduct on his last day of work, Charles does not testify to having admonished him for failing to work steadily. Thus, the Respondent has not met its burden, under Wright Line, of showing that Shanahan would have been terminated even absent his union activity.

The judge acknowledges that the threat to kill and the discharge were related to Shanahan's role as a union salt. As noted above, though, he assumed, based on his decisions in other cases,9 that because Shanahan was a salt, he was trying to sabotage the Respondent's operations and was looking for a way to be fired. The Board, however, has repudiated this judge's assumptions about salting in M. J. Mechanical Services, supra, and Ippli, Inc., 321 NLRB 463 (1996). In M. J. Mechanical Services, supra at 813 fn. 2, the Board stated that "[I]t is clear that the judge's personal opinion of union 'salting' rather than a close review of the record informed his conclusion." The comment is equally applicable here. The record is devoid of any evidence that Shanahan's intended salting activity would have included attempts to be fired or to sabotage the Respondent's operations. Indeed, there is no evidence to support a finding that Shanahan's planned salting activities would involve any unprotected conduct.

Without specifically addressing the judge's assumptions about salting, our dissenting colleague nevertheless contends that the judge correctly found that the Respondent did not unlawfully threaten or discharge Shanahan. Our colleague contends that, wholly apart from his union activity, Shanahan's failure to perform his work and to wear the required head gear led Charles to reasonably fear that Shanahan would disrupt the job, and that the Respondent's conduct was a legitimate response to that

⁵ In making this finding, the judge referenced his earlier decisions in *M. J. Mechanical Services*, 324 NLRB 812 (1997); and *Sullivan Electric Inc.*, JD–(NY)–04–95. In *M. J. Mechanical Services*, the Board, in reversing the judge's finding that the employees' salting activities were not protected, found that nothing in the record supported the judge's conclusions about the salting activity in that case.

⁶ There are no exceptions to the judge's finding that Shanahan was terminated.

⁷ Indeed, under Shanahan's version, the threat to kill and discharge were solely linked to Shanahan's union activity.

⁸ Under *Wright Line*, once the General Counsel establishes a prima facie case that an employee's protected conduct was a motivating factor in the employer's discharge decision, the employer has the burden of showing that it would have taken the same action even in the absence of the protected conduct.

⁹ Sullivan Electric, Inc., supra; and M. J. Mechanical Services, supra.

fear. Our colleague further contends that even if the General Counsel established a prima facie case, the Respondent rebutted it by showing that it had decided not to retain Shanahan because he would not travel. We find no merit to these contentions.

Even if the testimony of Charles, which is more favorable to the Respondent, is credited, that testimony would not provide a reasonable basis for concluding that the discharge of Shanahan was motivated by the Respondent's belief that Shanahan's failure to wear required head gear on that day and to do all the work assigned to him portended an intent to sabotage the job. First, as noted above, there is nothing in Charles' testimony that shows that the Respondent ordered or requested Shanahan to replace the allegedly inadequate headgear with a hardhat and hairnet. Similarly, in his testimony concerning Shanahan's alleged work deficiencies, although Charles describes Shanahan's unjustifiable failure to bring a requested piece of equipment to him and to work steadily on the job, he testifies to no instance of his reprimanding Shanahan for this or directing him to get on with the job. Instead, he describes an angry exchange between the two after Shanahan asked him to join the Union, which ended with Charles' saying, "I can't finish the job like this" and ordering Shanahan to leave. If the Respondent had been focused on an impediment to finishing the project posed by a failure on Shanahan's part to work steadily on it, it is likely that their exchanges would have turned on that. Instead, the angry exchanges between Shanahan and Charles (as reported by Charles) concerned Shanahan's remarks about the Union. Likewise, rather than ordering Shanahan to put on the proper headgear and get busy on the work at hand, Charles told him to leave. In short, it is untenable that the Respondent's reaction to Shanahan's conduct on that day was motivated by anything other than Shanahan's status as a salt and his exchanges with Charles on the subject of his organizing.

Our colleague also contends that, under Shanahan's version of the events, the Respondent's discharge of Shanahan was lawful because he made a "flippant and disrespectful response" to a work-related question. The Respondent, however, never offered this as the reason that Shanahan was discharged, and there is nothing in the record supporting such an assertion. This rationale is thus unavailable to the Respondent.

We also find nothing in the record to support our colleague's supposition that the Respondent was less tolerant of Shanahan's conduct because it had already decided not to make Shanahan a permanent employee in view of his inability to travel. Nor do we find persuasive our colleague's contention that, even assuming the General Counsel established a prima facie case, the Respondent rebutted it by showing that it would not have retained him because of his inability to travel. First, as noted above at footnote 4, while the record shows that the Re-

spondent did not hire him for a job in Albany because of his inability to travel, it does not show that the Respondent had decided not to retain him at all. To the contrary, and consistent with William Zeppelin's testimony, the fact that the Respondent hired Shanahan for the job from which he was discharged shows its willingness to hire Shanahan for local jobs. Moreover, Shanahan's inability to travel is irrelevant to the lawfulness of his discharge. At most, it is relevant to the issue of how long Shanahan would have been retained his current job ended. That is a matter for consideration in a compliance proceeding to determine the amount of Shanahan's backpay.

In sum, there is no basis for the judge's negative characterizations of Shanahan's salting activity or of his findings concerning the Respondent's motivations toward Shanahan's conduct. We find that Shanahan's salting activity was protected by the Act and that it was a motivating factor in the decision to terminate, and the Respondent has failed to establish that it would have discharged Shanahan absent that activity. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by threatening to kill Shanahan if he engaged in protected activity, and that the Respondent violated Section 8(a)(3) of the Act by discharging Shanahan for engaging in union activities.

ORDER

The National Labor Relations Board orders that the Respondent, Zeppelin Electric Company, Inc., Holbrook, New York, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Threatening to kill employees if they engage in union activities.
- (b) Discharging employees for engaging in union activities.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
- 2. Take the following affirmative action necessary to effectuate the Act.
- (a) Within 14 days from the date of this Order, offer Stephen Shanahan full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges.
- (b) Make whole, commencing from the date of his unlawful discharge, employee Stephen Shanahan for any loss of pay and other benefits suffered by him as a result of the discrimination practiced against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).
- (c) Within 14 days from the date of this Order, remove from its files any reference to the discharge of employee

Stephen Shanahan, and within 3 days thereafter notify him in writing that this has been done and that evidence of his unlawful discipline will not be used as a basis for future personnel action against him.

(d) Preserve and within 14 days of a request, make available to the Board or its agent for examination and copying, all payroll records, social security records and reports, and all other records necessary to analyze the amount of backpay due herein.

(e) Within 14 days after service by the Region, post at its facility in Holbrook, New York, copies of the notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 17, 1997.

(f) Within 21 days after service by the Region file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting.

Contrary to the majority, I find that the evidence falls short of showing that the alleged discriminatee, Stephen Shanahan, was threatened or discharged because of his protected union activity.

Shanahan responded to an employment advertisement which indicated that the position would require travel. He was hired by the Respondent on January 6, and was put to work on a local job at Entenmann's Bakery. He worked for 2 days. He was laid off when most of Respondent's work shifted to Albany on January 9. He had told the Respondent that he would not travel and thus would not go there.

On Monday, January 13, Shanahan called Charles Zeppelin, William Zeppelin's brother and Shanahan's supervisor, to see if there was work. (I shall hereafter refer to "Charles" and "William".) The Respondent had again started working at the Entenmann's Bakery jobsite

where Shanahan had worked the previous week. Charles told him that he could work there on Friday, the 17th. He did so. According to William's credited testimony, Shanahan was brought back to work on the Entenmann job because of a shortage of help, even though William had already decided not to keep Shanahan as a permanent employee because of his refusal to travel.

My colleagues say that William told Shanahan only that he could not work *in Albany* because he would not travel. It would seem obvious that, since Shanahan would not travel, he could not work in Albany. Thus, there would be no need to make such a limited statement. In any event, irrespective of what was said in this conversation, the judge found that William had in fact decided not to hire Shanahan as a permanent employee because of his refusal to travel. *There are no exceptions to this finding*.

As noted, however, Shanahan was permitted to work on a temporary basis on January 17. When Shanahan began work on the 17th, he gave Charles, a copy of a letter to the Respondent from the Union. The letter stated, inter alia, that Shanahan intended to organize Respondent's employees. Charles asked if this was a joke. The Union had also faxed William a copy of the letter. William then called Charles and told him not to do anything, except that Shanahan should not engage in union activity during working time. William also immediately called the union agent and arranged a meeting with him for the following week.

A little later that morning, there were conversations between Charles and Shanahan. The majority opinion sets forth two versions of those conversations, i.e., the version of Charles and that of Shanahan. The judge did not resolve this credibility conflict, except to find that Charles told Shanahan that he would kill Shanahan if anything happened to his brother. After that exchange, Charles told Shanahan to leave the jobsite.

There is an issue as to whether Charles' threat to kill was related to Shanahan's union activity. The judge found that it was not so related. Rather, the judge found that the threat was related to Charles' belief that Shanahan was trying to disrupt the job.

My colleagues say that, absent a credibility resolution concerning the conversations between Charles and Shanahan, the judge had no basis for making the above finding. However, the judge's finding has an independent basis. That is, the fact (not challenged by my colleagues) is that Shanahan was not performing his work and was refusing to wear the required head gear. Even if this misconduct would not establish that Shanahan intended to disrupt the job, the misconduct would at least establish that Charles reasonably feared such disruption.

¹⁰ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The judge found this to be so, and there is no basis for reversing this factfinding.¹

My colleague's conclude that Shanahan's version would support finding a violation. I disagree. Under Shanahan's version, Charles asked him what work he had performed. Rather than giving a respectful and responsive answer, Shanahan contumaciously responded that Zeppelin's employees did not know what they were doing. Employers, in my view, are not required to tolerate such a flippant and disrespectful response to a reasonable, job related question.²

In addition, absent the crediting of the General Counsel's witnesses, there is no evidence of animus. In arguing for a finding of animus, my colleagues point to: (1) Charles' question to Shanahan of whether he was kidding about his union activity; (2) Shanahan's statement to Charles that he would make Charles join the union; (3) the argument between Charles and Shanahan. Clearly, the first two do not establish animus on Respondent's part. And, as discussed above, the conversation, without credibility resolution, also does not do so.

Based on the above, the General Counsel has not established a prima facie case. Further, even if he did so, Respondent has clearly rebutted it. Thus the Respondent, before the verbal altercation, had decided not to retain Shanahan. He was hired briefly, for a short-term local job, because of an urgent need for an employee on that job. And, as noted, he refused to do his work on that job, and did not wear required head gear.

My colleagues say that the refusal to work and the refusal to wear the required head gear could not have been a basis for discharge. I disagree. Even if the Respondent would tolerate that conduct by a permanent employee, it would surely not tolerate that conduct by a person whom Respondent had decided not to retain as a permanent employee. Many employers, and I think most, will be more tolerant of a breach of discipline by an employee who is a "keeper" than by one whom the employer will not retain in any event.

In sum, even if antiunion animus was a reason for the discharge, Shanahan would have been terminated for lawful reasons.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

¹ My colleagues say that the judge based his finding on Shanahan's status as a salt. In fact, the finding is based on Shanahan's conduct.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to kill employees if they engage in union activities.

WE WILL NOT discharge employees for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employee Stephen Shanahan full reinstatement to his former position or, if that position no longer exists, to substantially equivalent position without prejudice to his seniority and other rights and privileges.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Stephen Shanahan, and notify him in writing that this has been done and that evidence of his unlawful discipline will not be used as a basis for personnel action him

ZEPPELIN ELECTRIC COMPANY, INC.

David Pollack, Esq., for the General Counsel. John J. Leo, Esq., for the Respondent. Kevin Barry, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me in Brooklyn, New York, on July 24, 1997. The charge and amended charge were filed on January 24, and April 30, 1997. The complaint was issued on May 9, 1997, and alleged as follows:

- 1. That on or about January 17, 1997, the Respondent by Charles Zeppelin, its foreman and agent, threatened employees with bodily injury if they supported, or assisted the Union or if they solicited other employees to become union members.
- 2. That on or about January 17, 1997, the Respondent, for discriminatory reasons, discharged its employee Stephen Shanahan

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED VIOLATIONS

The Company is a very small electrical contractor which employs, at any given time, between two to five employees. The owner and president is William Zeppelin. His brother,

² As noted above, I have set forth Shanahan's version of the conversation in order to show that it does not support a violation. Contrary to the suggestion of my colleagues, I am *not* contending that Shanahan's version was the reason for his discharge.

ZEPPELIN ELECTRIC CO. 457

Charles Zeppelin, works as a foreman and his son, William Zeppelin Jr., also works at various jobsites.

It is a nonunion contractor and does business throughout the State. In January 1997, it put an advertisement in Newsday, looking for an electrician. The ad indicted that the successful applicant should be willing to travel.

Stephen Shanahan is affiliated with Local Union No. 25, IBEW. For the past several years, he has made his living as a union "salt." This has meant that he has gone to work for various nonunion contractors and has gotten fired from several of them. Descriptions of the IBEW's salting program can be found in some of my earlier decisions such as *Sullivan Electric Inc.*, JD–(NY)-01-95; *Consolidated Electrical Service Inc.*, JD–(NY)-11-95; *Belfance Electric Inc.*, 319 NLRB 945 (1995); *Ippli, Inc.*, 321 NLRB 463 (1996); *Germinsky Electrical Co.*, JD–(NY)-19-97; and *M. J. Mechanical Services, Inc.*, JD–(NY)-71-95 [324 NLRB 812 (1997)].

William and Charles Zeppelin interviewed people who responded to the advertisement. Shanahan was interviewed by Charles Zeppelin on January 6 and he was hired to begin on January 7. He began work at Entemann's Bakery, where everyone was required to wear both hairnets and hardhats. Shanahan worked on Tuesday and Wednesday but on Wednesday, January 8, he was told that the Company was going to be doing a job up in Albany. As Shanahan said that he couldn't go, he did not work for the remainder of the week. As a result, William Zeppelin told Shanahan that if he couldn't travel, then he could not work for the Company. Although this is denied by Shanahan, I do not believe him.²

Shanahan testified that during the 2 days that he worked for the Company, on January 7 and 8, he did *not* talk to any of the other employees about the Union. Until the morning of January 17, there is no reason to believe that anyone from the Company knew that Shanahan intended to engage in any type of union activity.

From January 9 until 12, the Company's work force was up in Albany. (They went in company vans and their meals and board were paid for by the employer.)

According to Shanahan, when he didn't hear from the Company on Sunday, he called and spoke to Charles Zeppelin on Monday, January 13. Shanahan claims that he was told that the Company was still working in Albany, whereupon he stated that although he would love to work there, he couldn't. According to Shanahan, Zeppelin told him that the Company was going to resume work at Entemann's on Friday and asked if he could work then.

The evidence shows, however, that the Company finished its work in Albany and that the crew returned to New York on Sunday, January 12. They worked at Entemann's Bakery starting on Monday, January 13. Two new people were hired to work as electricians after Shanahan had informed the Company, on January 8, that he was unable to travel to Albany.

Before going to the jobsite on Friday, Shanahan visited the Union's office and met with Kevin Barry. He was given a letter for presentation to Charles Zeppelin and told that a copy of the letter would be faxed to the Company. This letter read:

Please be advised that one of your employees, Stephen Shanahan, will be trying to organize the men in your shop into the IBEW on his off hours on behalf of Local 25, International Brotherhood of Electrical Workers.

I caution you not to discriminate against Mr. Shanahan or any other employees who may be sympathetic to Local 25. IBEW.

The letter described above was received by William Zeppelin at his office at 8:55 a.m. He testified that he immediately telephoned his brother at the jobsite and read him the letter. He told Charles not to do anything except that Shanahan should not engage in union activity during working time. (He states he said this based on the contents of the Union's letter which he assumed correctly defined the parameters of what an employee could legally do on the job in terms of union activity.) According to William Zeppelin, he immediately called Union Agent Barry, and arranged for a meeting with him for the following week. (Barry did not testify in this proceeding.)

As far as Shanahan is concerned, William Zeppelin testified that he already had decided the week before not to retain Shanahan as a permanent employee because of his refusal to travel. He states that he only brought Shanahan back to work at the Entemann's site because he was short of men for that particular week. Zeppelin testified that he had no intention of using Shanahan thereafter.

The more dramatic events happened at the jobsite on January 17 and William Zeppelin was not involved in them. He learned of what happened after he visited the jobsite that morning and found that no one was there.

According to Shanahan, he handed Charles Zeppelin the aforementioned letter at about 9 a.m.³ He stated that after reading the letter, Zeppelin asked if this was "some kind of fucking joke." According to Shanahan, he responded that it was not a joke; that Zeppelin stared at him and that he went back on the roof to resume his work. Shanahan testified that about 20 minutes later, Charles Zeppelin came onto the roof and after telling the two other workers to go with him, yelled; "I love my brother and if anything happened to him, I will fucking kill you." According to Shanahan, Zeppelin was swinging an aluminum pipe. He states that when he asked Zeppelin, (who is a very large man), to take it easy, Zeppelin asked him what work he had done all morning. At this point, Shanahan claims that he pointed to some bent pipe and said that the two new workers didn't know what they were doing and that if the company hired Local 25 members it would get competent workmen. According to Shanahan, Zeppelin said; "[T]ake you and you're union shit and get out of here." Shanahan then left and went to the police station. Although there was some kind of complaint filed, no action was taken by the police.

Charles Zeppelin gave a somewhat different version of what happened. He testified that he assigned Shanahan to work on the roof and that at about 9 a.m. Shanahan came down and handed him the letter. He also testified that he noticed that

¹ The last case involved a different union in the construction industry that adopted the IBEW's salting program.

² I do not credit Shanahan's assertion that during his initial job interview, he told Charles Zepellin that he could not go to Albany that week and that he was told that this was okay.

³ Charles Zeppelin ordinarily is assigned to be the foreman of the crew. Although he is a working foreman, it seems to me that the record establishes that he responsibly directs the work of others. As he is also the brother of the owner, there is no doubt in my mind that he is viewed by the employees as having managerial or supervisory authority. Accordingly, I conclude that he is a supervisor as defined in Sec. 2(11) of the Act or an agent as defined in Sec. 2(13) of the Act.

Shanahan was wearing a Local 25 hat and was not wearing either the required hair net or the required hardhat. According to Charles Zeppelin, he asked Shanahan if he was kidding and was told no. Charles states that he got a phone call from his brother who told him about the letter and who said that he was going to talk to someone from the Union. According to Charles, his brother told him to send another employee, Mike, to the office because he was late again for work.

Charles Zeppelin testified that he went looking for Mike and couldn't find him. After looking, Charles found out that Shanahan was not working but was talking to Mike about the Union. Charles testified that at this point, he sent Shanahan dowstairs to get a hacksaw to cut some pipe, whereupon Shanahan left, returned and said he couldn't find one. Charles states that Shanahan asked him to join the Union and he responded negatively. According to Charles, Shanahan said something like, "[W]e have ways of making you join." When Charles noticed that Shanahan was not doing any of the work assigned to him, he approached Shanahan and claims that he said; "If anything happens to my brother I'm holding you personally responsible." Charles states that Shanahan gave him the finger and he told Shanahan, "[H]ow would you like it if you're family was messed with." According to Charles, Shanahan asked if he was being threatened and said that he was going to the police to get a protective order. Charles told Shanahan to leave and Shanahan asked if he was being fired. According to Charles, he told Shanahan that as he was not the boss, he couldn't fire him, and that he would have to talk to the boss (his brother). According to Charles, Shanahan's parting words were; "All you guys in the crew are fucking assholes."

There were no witnesses who were close enough to hear what Charles Zeppelin and Shanahan said to each other. The gist of the story as far as Shanahan's version is concerned, is that after handing Charles the letter, Charles became irate and after making a threat, fired him. On the other hand, the gist of Charles' testimony is that after being shown the letter, he became aware, as the morning progressed, that Shanahan was not doing his work, was talking to other employees about the Union on working time, and that he was not following proper procedures by not wearing a hairnet and hardhat. As such, his state-

ment to Shanahan to the effect that he either was going "to kill him," or hold him "personally responsible," would, if Charles version is credited, have been motivated not because of any legitimate union activity by Shanahan, but by his reasonable conclusion that Shanahan was engaged in sabotage in an effort to undermine the Respondent's contract with Entemann's.

Based on the facts presented in this case and on my consideration of demeanor, it is my opinion that Shanahan never intended to become a permanent employee of the Company and was intent on provoking the employer into discharging him. Thus, at the very outset of his employment and despite being hired with the understanding that he would be willing to travel, Shanahan refused to go with the crew to Albany. Although being called back to finish some work at Entemann's on January 17, it is my opinion that Shanahan was looking for a way to be fired and ultimately accomplished that result. Thus, he did not do the work assigned to him and presented himself to Charles, the foreman, without a hairnet or hardhat as required.

In my opinion, Charles probably did say that he would "kill" Shanahan if anything happened to his brother. But, it is my conclusion that this threat was intended, not because of Shanahan's union or protected concerted activity, but because Charles had good reason to believe that Shanahan was trying to sabotage the job and undermine the employer's relationship with Entemann's. Although it may be said that Charles may have committed a tort or some other state violation by making a threat of bodily harm, I do not conclude that the Respondent has violated the Act either by discharging Shanahan or by threatening employees because of their union or protected concerted activity.

CONCLUSION OF LAW

The Respondent has not violated the Act in any other manner alleged in the compliant.

[Recommended Order for dismissal omitted from publication.]

⁴ This is not unlike some of the factual patterns in *Sullivan Electric*, supra, and *M. J. Mechanical Services*, supra.